In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1113

CHICOT LAND COMPANY, INC.,
Petitioner,

vs.

ALLEN EUGENE KELLY, SR. and
GARLAND WAYNE KELLY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES L. ROBERTSON
LAWRENCE D. WADE
CLAUDE L. STUART, III
923 Washington Avenue
Greenville, Mississippi 38701
Attorneys for Chicot Land Company, Inc., Petitioner

F. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Chicot Land Company, Inc., Petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on August 28, 1973, on which rehearing was denied on November 19, 1973.

I. OPINIONS BELOW

The opinion of the Court of Appeals, rendered August 28, 1973, reported at 485 F.2d 520 (5th Cir. 1973), is attached hereto as Appendix "A".

The opinion of the Court of Appeals denying rehearing, rendered November 19, 1973, is attached hereto as Appendix "B".

The opinion of the District Court on the issues of jurisdiction, laches, and liability, not reported, rendered on April 13, 1972, is attached hereto as Appendix "C".

The opinion of the District Court on the issue of damages rendered June 27, 1972, reported at 346 F. Supp. 20 (N.D. Miss. 1972), is attached hereto as Appendix "D".

II. JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1973. Timely petitions for rehearing and/or for rehearing *en banc* were filed and said petitions were denied on November 19, 1973. This petition for a writ of certiorari has been filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. §1254(1).

III. QUESTIONS PRESENTED

(1) Whether or not admiralty tort jurisdiction encompasses civil actions for assault and battery arising out of a shooting incident between members of a private hunting club, standing on dry land, and fleeing deer poachers in an outboard motorboat on navigable waters in a chute leading out to the Mississippi River?[1]

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1. The Court of Appeals correctly noted that:
The issue of jurisdiction is crucial. If jurisdiction was sustainable only on diversity grounds the Kellys' *Erie*-bound claim was barred by the Mississippi one-year statute of limitations for assault and battery cases. 485 F.2d at 523.

The two other states potentially involved, Arkansas and Louisiana, likewise have one year limitations periods for assault and battery cases. See footnote 14, *infra*.

(2) Whether or not a tort accruing on navigable waters, having no actual effect on maritime commerce and activities, but rather having only a remote or potential effect thereon, lies within admiralty jurisdiction?

(3) Whether or not, and/or to what extent, tort actions involving pleasure craft and other recreational vessels, accruing on navigable waters, but having no significant relationship to maritime commerce or traditional maritime activities, lie within admiralty jurisdiction?

IV. STATEMENT OF THE CASE

A. Summary of the Facts

On the afternoon of November 27, 1965, Allen Eugene Kelly, Sr. and his three sons, Allen Eugene Kelly, Jr., Garland Wayne Kelly, and Joseph Dale Kelly, poachers and trespassers all, went to Woodstock Island, Mississippi, to hunt.[2] Having entered the island without authority, the Kellys' presence was detected by J. C. Smith and Billie H. Bledsoe, the caretaker and a member, respectively, of a private hunting club which held an exclusive license to the hunting rights on Woodstock. As they reached a point near the eastern edge of Woodstock Island, Smith and Bledsoe noticed the Kellys launching their 15 foot outboard motorboat in a navigable chute leading out to the Mississippi River.

In a few moments, the Kellys were in their boat in the water fleeing southward making their exit from Woodstock Island. J. C. Smith, standing on the high bank, fired a shot toward the boat, indicating that he wanted the Kellys to stop. Then he motioned for the Kellys to come back into

2. The area in question is a chute lying on the extreme western edge of Mile 539, Lower Mississippi River.

the land. When the Kellys did not stop, Smith fired another shot into the water next to the boat. Allen Eugene Kelly, Sr. stood up and indicated to Smith and Bledsoe that they, the Kellys, were not going to come back in to the bank. The Kellys then proceeded full ahead and began to leave the premises. Smith and Bledsoe fired again. One of the shots hit Allen Eugene Kelly, Sr. in the right ankle.

Allen Eugene Kelly, Jr. returned the fire. Garland Wayne Kelly was then hit by gunfire from Smith and Bledsoe. Thereafter, the firing ceased and the Kellys proceeded across the Mississippi River to Warfield Point, Mississippi, and from there they were taken to the hospital.

B. Proceedings Below

In early 1971, more than five years after the shooting incident took place, the Kellys filed three suits in the United States District Court for the Northern District of Mississippi, naming J. C. Smith, Billie H. Bledsoe, Chicot Land Company, Inc., Anderson-Tully Company, and the members of the Woodstock Hunting Club as Defendants. The initial complaint alleged *diversity of citizenship* jurisdiction. A month later, two new complaints were filed, asserting *admiralty* jurisdiction.[3] All complaints recited

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3. On February 3, 1971, Allen Eugene Kelly, Sr. filed Civil Action No. GC 71-5-S in the District Court naming J. C. Smith, Billie H. Bledsoe, Chicot Land Company, Inc. and Anderson-Tully Company as Defendants. The basis for jurisdiction was **diversity of citizenship.**

On March 3, 1971, Garland Wayne Kelly filed in the same court Civil Action No. GC 71-18-S, naming, as Defendants, J. C. Smith, Billie H. Bledsoe, Chicot Land Company, Inc., Anderson-Tully Company, and the members of the Woodstock Hunting club, an unincorporated association. Two jurisdictional bases were asserted: **diversity of citizenship** and **admiralty.**

On March 3, 1971, Allen Eugene Kelly, Sr., filed in the same court Civil Action No. GC 71-19-S, naming as Defendants, J. C. Smith, Billie H. Bledsoe, Chicot Land Company, Inc., Anderson-Tully Company and the members of the Woodstock Hunting Club. Plaintiff alleged **admiralty** jurisdiction.

traditional common law assault and battery causes of action.

Petitioner, Chicot Land Company, Inc., answered all three Complaints, affirmatively alleging, *inter alia*, (1) that, insofar as these actions were predicated upon diversity of citizenship jurisdiction, they were barred by the one year Mississippi statute of limitations for assault and battery cases, and (2) that these cases did not fall within admiralty jurisdiction.

On April 10, 1972, these consolidated cases went to trial before United States District Judge Orma R. Smith sitting in admiralty without a jury. At the conclusion of the trial, judgment was entered in favor of Plaintiff, Allen Eugene Kelly, Sr. and against the Defendants J. C. Smith, Billie H. Bledsoe and Chicot Land Company, Inc. in the amount of $69,772.40. Further, judgment was entered in favor of the Plaintiff Garland Wayne Kelly and against the Defendants J. C. Smith and Chicot Land Company, Inc. in the amount of $2,593.96. In all cases, judgment was entered in favor of Anderson-Tully Company and that Defendant was finally dismissed.

Thereafter, Petitioner, Chicot Land Company, Inc., perfected its appeal to the United States Court of Appeals for the Fifth Circuit. On August 28, 1973 the District Court judgments were affirmed, one judge dissenting.

The panel majority found that these civil actions were cognizable within admiralty tort jurisdiction. The dissenting judge would have held that these cases bore no significant relationship to traditional maritime activity and, therefore, lay outside the scope of admiralty tort jurisdiction as defined in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972).

V. REASONS WHY CERTIORARI SHOULD BE GRANTED

A. General Context and Background

These cases present the questions, whether or not, and/or to what extent, the mere fact that litigants are in a non-commercial, pleasure craft on navigable waters at the time a tort action accrues is sufficient to confer admiralty jurisdiction. These questions are presented against the background of

(1) the failure of the Court of Appeals to follow the definitive decision of this Court in *Executive Jet*, an admiralty tort jurisdiction case having an aviation context;

(2) a head-on conflict between the Fourth Circuit in *Crosson* v. *Vance*, 484 F.2d 840 (4th Cir. 1973) and Fifth Circuit in the cases at bar concerning the application of *Executive Jet* in a non-commercial, pleasure craft context;

(3) widely varying post-*Executive Jet* district court decisions within the Second, Eighth and Ninth Circuits, pregnant with potential for further inter-circuit conflict;[4]

(4) post-*Executive Jet* district court decisions which suggest that the admiralty jurisdictional test in *Executive Jet* has no application to non-aviation cases;[5]

(5) a broad and pervasive pre-*Executive Jet* conflict among the circuits regarding the proper definition of ad-

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4. Second Circuit: *Rubin* v. *Power Authority of New York*, 356 F. Supp. 1169 (W.D. N.Y. 1973); Eighth Circuit: *St. Hilaire Moye* v. *Henderson*, 364 F. Supp. 1286 (E.D. Ark. 1973) (appeal pending); Ninth Circuit: *Adams* v. *Montana Power Co.*, 354 F. Supp. 1111 (D. Mont. 1973), appeal docketed, No. 73-1371, 9th Cir. July 25, 1973. These cases are discussed at pages 20-21, *infra*.

5. *Watson* v. *D/S/A Idaho*, 359 F. Supp. 496, 499 (E.D. Pa. 1973); *Luna* v. *Star of India*, 356 F. Supp. 59 (S.D. Calif. 1973).

miralty tort jurisdiction in a non-aviation context, which conflict by reason of the factual setting in which it arose, *Executive Jet* has failed to inter;[6]

(6) a substantial body of pre-*Executive Jet* pleasure craft litigation in which the jurisdictional issues have been considered and differently resolved;[7]

(7) a substantial body of scholarly commentary regarding the jurisdictional standards applicable in pleasure boat accident litigation.[8]

B. The Importance and Necessity for a Prompt, Definitive Resolution of the Questions Presented

Recent Coast Guard figures show that over 5,500,000 small boats are now being operated on the waters of the United States.[9] In 1971, there were almost 4000 boating accidents, resulting in over 1500 fatalities. These figures can only be expected to increase, particularly in the Fifth

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6. Compare cases cited in footnote 6 in *Executive Jet*, 409 U.S. at 256-257, with *United States* v. *Matson Nav. Co.*, 201 F.2d 610, 613 (9th Cir. 1953); and *Berwind-White Coal Mining Co.* v. *City of New York*, 135 F.2d 443, 446 (2d Cir. 1943).

7. Compare *Madole* v. *Johnson*, 241 F. Supp. 379 (W.D. La. 1965), and *Free* v. *Sample*, 324 F. Supp. 1362 (W.D. Ark. 1971), with *Shogry* v. *Lewis*, 225 F. Supp. 741 (W.D. Pa. 1964), and *Johnson* v. *Wurthman*, 227 F. Supp. 135 (D. Ore. 1964), and *In Re Howser*, 227 F. Supp. 81 (W.D. N.C. 1964).

8. See, Stolz, *Pleasure Boating and Admiralty*, 51 Cal. L. Rev. 661 (1963); Waite, *Pleasure Boating in a Federal Union*, 10 Buffalo L. Rev. 427 (1961); Auten, *Federal and State Regulations of Boating*, 37 Temple L.Q. 446 (1964).

9. The United States Coast Guard is required to keep these statistics, 46 U.S.C. §1486 (e). The Coast Guard has reported that:

> There were 3909 boating accidents reported for calendar year 1971 involving some 4915 vessels. 1257 of these vessels were involved in 1219 boating accidents which resulted in 1582 fatalities. 757 vessels were involved in 574 accidents resulting in 897 personal injuries. And, 2901 vessels were involved in 2116 accidents accounting for $9,022,000 in property damage. U. S. Coast Guard, *Boating Statistics* (1971) 7.

Circuit. It is likely that the vast majority of these injuries and deaths which result in lawsuits will wend their way into the courts, which, without a specific jurisdictional yardstick, predictably will reach varying results. More realistically, if the questions presented here are not resolved by this Court, these suits will be brought in the federal courts of the Fifth and probably the Eighth Circuits but in the state courts of the Fourth and probably the Second and Ninth Circuits.

But knowing which courthouse to file his suit in is only a small part of the dilemma now facing the motorboat accident litigant. *Executive Jet* correctly notes that admiralty jurisdiction carries with it "the full panoply of the substantive admiralty law." 409 U.S. at 255. That there are major differences between substantive admiralty tort law and state tort law may be illustrated by the following, necessarily abbreviated, comparative table:

	State and Common Law	Admiralty Law
Effect of Plaintiff's negligence	Contributory negligence a bar in many states	Comparative negligence rule
Status of Visitors	Trespassers, licensees invitees, and other fixed categories	Reasonable care standard for all classes of visitors
Defendant's violation of statutory duty of care	Plaintiff has burden of proving violation proximately caused his damages	Defendant has burden of proving violation could not have caused the plaintiff's damages
Collisions where both parties at fault	Damages apportioned according to degrees of fault	Damages divided equally irrespective of degrees of fault
Damages in wrongful death cases	General damages; economic value of life; etc.	Damages limited to Dependents pecuniary loss

Several more practical, but often extremely important, distinctions between state and admiralty practice are:

State practice	Admiralty practice
Jury trials	No jury trials
Statute of limitations	Laches
In personam suits only	*In rem* actions allowed
Discovery often restricted	Liberal discovery
Third party practice often restricted	Liberal third party practice

The list could be made much longer. Suffice it to say that the answer to the questions presented here will have an enormous impact on thousands of potential litigants.

That the jurisdictional inquiry is truly outcome determinative is made starkly apparent by the case at bar, where, without admiralty jurisdiction, Plaintiffs' suits would have been barred by the statute of limitations.

Against this background, Petitioner respectfully submits that the questions presented are ripe for consideration and definitive resolution by this Court.

C. The Court of Appeals Has Decided an Important Question of Federal Jurisdiction in a Way in Conflict with the Applicable Decision of This Court

1. General Statement

In *Executive Jet*, this Court held that, as a prerequisite to the existence of admiralty tort jurisdiction, **"the wrong"** must "bear a significant relationship to traditional maritime activity". 409 U.S. at 268. *Executive Jet* expressly rejected the traditional "strict locality" test for admiralty tort jurisdiction, which had evolved through *The Plymouth*, 70 U.S. (3 Wall.) 20, 35-36 (1866) and other cases.

More specifically, *Executive Jet* rejects the notion that all accidents occurring on navigable waters are subjects of admiralty jurisdiction. Nevertheless, the Fifth Circuit announced its own four-pronged test requiring a case by case analysis of

> [1] the functions and roles of the parties; [2] the types of vehicles and instrumentalities involved; [3] the causation and the type of injury; and [4] traditional concepts of the role of admiralty law. 485 F.2d at 525-526.

That test brings within admiralty jurisdiction **every** pleasure boat accident case occurring on navigable waters regardless of the nature of the wrong or its relation to traditional maritime activities. An analysis of the functions and roles of the parties,[10] suggested below, will *always* produce a "pilot". Consideration of "the types and vehicles and instrumentalities involved" will *always* yield a "vessel". A study of "the causation and the type of injury" will *always* give rise to a potential interference with maritime commerce. "Strict locality", in the Fifth Circuit, at least, has been replaced by "locality plus a boat".

In the opinion below, the Fifth Circuit holds that the tortious conduct of Smith and Bledsoe "presents sufficient danger to maritime commerce" to invoke admiralty

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10. An analysis of the functions and roles of the parties in this case wholly fails to support a finding of admiralty jurisdiction. Here Plaintiffs (a) are *not* seamen, either Jones Act or *Sieracki* variety, (b) are *not* passengers for fare, (c) are *not* persons who might have reasonably anticipated that their rights and remedies would be governed by maritime law, and (e) are *not* persons deserving of the protection and shelter traditionally afforded the wards of the admiralty. Defendants (a) are *not* seamen, (b) are *not* owners or operators of vessels, (c) *were* standing on dry land, (d) are *not* persons who might have reasonably expected their liabilities to be judged by maritime law. Finally, there is *no vessel* in these cases which may be subjected to *in rem* jurisdiction.

tort jurisdiction. 485 F.2d at 526. The Fifth Circuit has thus held that a *potential* interference with maritime commerce is sufficient to support jurisdiction. In *Executive Jet*, however, the Court held that *actual* interference was required. Herein lies the fundamental problem with the opinion below. In *Executive Jet* the aircraft coming to rest in Lake Erie certainly had a *potential* effect on commerce. But because of the absence of an *actual* effect on maritime commerce, this Court found no admiralty jurisdiction.

This Court's rejection of the potential effect theory was further expressed by the disapproval of a surfboard accident case, *Davis* v. *City of Jacksonville Beach*,[11] 251 F. Supp. 327 (M.D. Fla. 1965) in footnote 5 in *Executive Jet*, 409 U.S. at 256.

Executive Jet likewise disapproved the jurisdictional holding in *King* v. *Testerman*, 214 F. Supp. 335 (E.D. Tenn. 1963). In *King*, plaintiff, while water skiing, was injured as a result of the negligence of the operator of the boat by which plaintiff was being towed. The district court found admiralty jurisdiction. *Executive Jet's* rejection of *King* and the opinion of the panel majority below cannot logically co-exist.

Executive Jet holds that it is *the wrong*, not the parties, not the vessel, which must bear a significant relationship to traditional maritime activities. The Fifth Circuit's "causation and type of injuries" test, 485 F.2d at 525-526, is the only one of the four tests employed below, which

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11. In upholding admiralty jurisdiction, the *Davis* Court had reasoned that

> Of course, the present accident produced no direct or indirect influence on shipping and commerce. But a surfboard, by its very nature, operates almost exclusively on the high seas and navigable waters, and, just like a small canoe or raft, potentially can interfere with trade and commerce. 251 F. Supp. at 328.

comes close to compliance with the commands of *Executive Jet*. The causes of this accident, from the general to the specific, were (a) a dispute over hunting rights, (b) an attempt to apprehend fleeing poachers and trespassers and (c) the intentional firing of hunting rifles. The injuries were gunshot wounds—no different than if the Kellys had been shot on dry land. Where is the significant relationship with traditional maritime activity?

2. An Executive Jet-Controlled Approach to Traditional Concepts of the Role of Admiralty Law Fails to Support Admiralty Jurisdiction in These Cases

a. The "Conceptual Expertise" Role of Admiralty Law

Executive Jet places major emphasis, not on the mere furnishing of a remedy to one being transported in a boat, but on the "conceptual expertise of the [remedial] law to be applied." 409 U.S. at 269. Admiralty law evolved gradually over the centuries to handle specific and uniquely maritime problems, e.g., collisions, navigational rules, seaworthiness, maintenance and cure, liens, general average, captures and prizes, limitation of liability, cargo damage, claims for salvage. True enough, each provided a remedy, as does all law, but a peculiar maritime remedy. These Plaintiffs, by way of contrast, were afforded the same substantive remedy any landlocked assaultee would have had. The district court here adjudicated fault, causation, respondeat superior and damages according to common law principles.

A genuine maritime assault and battery case differs significantly from the localized common law actions involved here. In *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955), this Court recognized what has subsequently

become the dominant theory of maritime assault and batteries, viz., unseaworthiness of the vessel created by employing "a seaman with a proclivity for assaulting people." 348 U.S. at 339.[12] This species of liability without fault as applied to intentional torts demands "the conceptual expertise of law" so peculiarly maritime as suggested in *Executive Jet*. This conceptual expertise, however, is wholly superfluous and irrelevant in common law assault and battery actions, such as those here before the Court.

b. The Fifth Circuit Has Confused the Commerce Clause with Admiralty Jurisdiction

A further error in the panel majority's analysis of the role of admiralty law derives from its statement that

> the federal interest in protecting navigation on the Mississippi River overrides any considerations of federal-state comity or conflicts of interest. 485 F.2d at 526.

Here the panel has confused the power of the Congress to regulate interstate commerce with the power of the federal judiciary to adjudicate matters maritime.

Executive Jet speaks instructively to this point:

> It may be, as the petitioners argue, that aviation tort cases should be governed by uniform substantive and procedural laws, and that such actions should be heard in the federal courts so as to avoid divergent results and duplicitous litigation in multi-party cases. But for this Court to uphold federal admiralty jurisdiction in a few wholly fortuitous aircraft cases would be a most

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12. Or, as observed by commentators: "But apart from such common-law principles, a seaman may be entitled to recover in this situation if he can establish that the assault resulted from the shipowner's breach of the warranty of seaworthiness." *Annot.*, 99 L.Ed. 359, 360-61 (1954).

> quixotic way of approaching that goal. If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce. 409 U.S. at 273-274.

Federal courts sitting in admiralty may not hear and adjudicate tort actions in which the wrong bears no significant relationship to traditional maritime activity. The Fifth Circuit to the contrary notwithstanding, *Executive Jet* holds that no matter how great or important the national interests here may be, they may not serve to extend the admiralty jurisdiction of the federal courts beyond that granted by the Constitution.

3. Executive Jet Holds That Admiralty Tort Jurisdiction Will Not Be Expanded to Cases Where No Federal Maritime Interest in Uniformity of Law Exists

The exercise of admiralty jurisdiction over localized, common law assault and battery actions serves no substantial federal maritime interests and frustrates legitimate state interests. In *Executive Jet* this Court emphasized that Ohio courts were competent to exercise jurisdiction over the tort where maritime interests would not be affected. 409 U.S. at 273. The fact that admiralty jurisdiction does not invade powers reserved the states was noted in *Executive Jet*:

> "Just last Term, in *Victory Carriers, Inc.* v. *Law*, 404 U.S. at 212, we observed that in determining whether to expand admiralty jurisdiction, 'we should proceed with caution . . . .' Quoting from *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934), we stated:

> The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution . . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined." 409 U.S. at 272-273.

Executive Jet, therefore, has weighed and evaluated the state and federal maritime interests in an aviation context, 409 U.S. at 253-261, and the answer given is equally applicable in the context of common law torts involving small, non-commercial boats.

a. The State Interests

The interests of the State of Mississippi in this matter are evidenced by the criminal prosecutions undertaken in Mississippi Courts.[13] Likewise, the State of Mississippi has a demonstrable interest in providing a civil remedy for its citizens, shot and wounded under circumstances involving Mississippi soil and water. Mississippi's interest in requiring that such actions be brought within one year is likewise paramount. **In fact, in no civil jurisdiction, state or federal, may an action for the tort of assault and battery be brought more than three years after the**

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13. On June 10, 1966, the Washington County, Mississippi Grand Jury indicted Smith and Bledsoe on a charge of assault and battery with a firearm, a felony. Later, on January 23, 1968 Smith and Bledsoe were brought to trial in the Circuit Court of Washington County, Mississippi. *State of Mississippi* v. *J. C. Smith, et al.*, Criminal Docket No. 14,515. After several witnesses testified, Smith and Bledsoe entered pleas of guilty to the lesser charge of assault and battery, a misdemeanor, and each was fined $175 plus costs.

cause of action accrues![14] More specifically, there is no federal maritime interest which requires an overruling of Mississippi's judgment that this assault and battery action should have been extinguished one year after it accrued. Yet, the Court of Appeals permitted these suits to be instituted more than five years after the shooting incident occurred.

b. The Federal Maritime Interests

In addition to expertise in a unique field, federal admiralty jurisdiction has traditionally advanced one fundamental interest, uniformity of the general maritime law. *Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970).

In dissent below, Judge Morgan correctly noted that "Uniformity is hindered, not advanced, by the majority's decision in this case." 485 F.2d at 528.

The correctness of Judge Morgan's statement is brought home by a reversal of the facts in this case. Assume another shootout wherein the poacher firing from a boat wounded the caretaker. Could the caretaker bring a suit in admiralty against the poacher? Does it make any

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14. A survey of the states and their statutes of limitations reveals: *Seventeen (17) states* [Alabama, **Arkansas**, California, Colorado, Kansas, Kentucky, **Louisiana**, Maryland, **Mississippi**, Nebraska, New York, North Carolina, Ohio, Oklahoma, Tennessee, Utah, and Wyoming] and the District of Columbia have one year statutes of limitations; *twenty-nine (29) states* [Alaska, Arizona, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, Washington, West Virginia, and Wisconsin] have two year statutes; and only *four (4) states* [Connecticut, New Mexico, Rhode Island, and Vermont] permit such an action to be brought as late as three years after the event. Also of importance for comparison purposes are the Death On the High Seas Act, which contains a two year statute of limitations, 46 U.S.C. §763, and the Jones Act, which has adopted the three year FELA limitations period. 46 U.S.C. §688; 45 U.S.C. §56.

sense in either case to have jurisdiction turn on which gunman is the most accurate shot?[15] Suppose the caretaker had attempted to bring an action five years after the date of wounding. It makes no sense to permit the poacher to have his cause of action while the caretaker's suit under the above hypothesis would be barred. **Do not the anomalies created by the above situation originate in a single source—the supposition that admiralty jurisdiction obtains over cases of this nature?** If admiralty jurisdiction does not lie, there would be a single, uniform set of rules governing the rights and responsibilities of all concerned, caretaker and poacher. **Yet, ironically, admiralty, the body of law that most strongly proclaims the need for uniformity, is the vehicle for a decision which, if allowed to stand, would create a bramble bush for courts, future litigants and their counsel.**

D. Executive Jet Has Left Unsettled an Important Question of Federal Jurisdiction Which Has Led to a Direct Conflict Between the Circuits

There is a conflict among the circuits which, when coupled with a growing number of inconsistent district court opinions and a recognition of the importance of the jurisdictional question at issue, supports the granting of certiorari here. Five recent post-*Executive Jet* cases have reached varying jurisdictional results based on disparate reasoning. These inconsistent results are a direct result of the failure of *Executive Jet* to delineate in a non-aviation context the meaning of "traditional maritime activity."

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15. For jurisdictional purposes, the courts look to the place where the injury was inflicted on plaintiff, not where the tort was committed by defendant. *Watz* v. *Zapata Off-Shore Company*, 431 F.2d 100, 109 (5th Cir. 1970).

1. The Fifth Circuit vs. the Fourth Circuit

The confusion in the Fifth Circuit cases[16] and the presence of a conflict between the circuits is made clear by *Crosson* v. *Vance, supra*, a recent Fourth Circuit decision.[17] There suit was brought for negligent towage of a water skier in a tributary of the Chesapeake Bay. The Court of Appeals found no apparent federal maritime interest in providing a forum or a uniform body of law for the adjudication of claims growing solely out of the operation of pleasure craft.

The Fourth Circuit based its decision on footnote 5, in which the *Executive Jet* rejected *King* v. *Testerman*, itself a negligent skiing case. Still, the Court noted in all candor, that without this footnote it would remain "an open question" what, in the context of the operation of small boats and injuries to water skiers, would be a traditional maritime activity.

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16. The Fifth Circuit's most prominent pre-*Executive Jet* foray into this area was *Peytavin* v. *Government Employees Insurance Company*, 453 F.2d 1121 (5th Cir. 1972). The confusion existing within the Fifth Circuit becomes apparent when *Peytavin* is read alongside the panel decision below and with *Watz* v. *Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970). Further, exacerbating this confusion and the conflict between the Fourth and Fifth Circuits is *Green* v. *Ross*, 481 F.2d 102 (5th Cir. 1973), a post-*Executive Jet* decision, in which the Fifth Circuit assumes *sub silentio* admiralty jurisdiction over a motorboat/skin diver accident in the Atlantic Ocean two miles off the Florida coast. There is no way these cases may be logically reconciled, either among themselves or with *Executive Jet*.

17. Assume a pleasure boating accident occurring on the navigable waters of the Savannah River. Not only does the Savannah divide Georgia and South Carolina, but, more importantly, it is the boundary between the Fourth and Fifth Circuits. By reason of the conflict between the opinion below and *Crosson*, the potential for capricious results is unlimited. Similarly, if the Eighth Circuit should affirm *Moye* and if the Ninth Circuit should affirm *Adams*, opposite rules of admiralty tort jurisdiction would apply on the navigable waters of the Missouri River as they flow from Montana into South Dakota.

The *Crosson* opinion consists primarily of the Fourth Circuit's effort to do what this Court would have it do. Following *Executive Jet*, the Fourth Circuit held that a mere *potential*, as distinguished from *actual*, effect upon maritime commerce is not sufficient to bring a particular civil action within the scope of federal admiralty jurisdiction. The Fourth Circuit has thus placed itself squarely in conflict with the Fifth Circuit on a fundamental jurisdictional question: Must the "significant relationship", which *Executive Jet* demands that "the wrong" bear to traditional maritime activities, be *actual*, or may it merely be *potential*?

This conflict becomes glaringly apparent in the face of a factorial comparison and analysis of the cases in each circuit.

	Factors	Kelly (Fifth Circuit)	Crosson (Fourth Circuit)
1.	Functions and roles of parties	pilot and passengers	pilot and passengers
2.	Types of vehicles and functions	outboard motorboat	outboard motorboat
3.	Type of instrumentality	firearms	waterskiis
4.	Causation of injury, i.e., the wrong	gunshot	negligent towing
5.	Type of injury	personal injuries	personal injuries
6.	Role of admiralty tort law	none	none
7.	Waters on which tort consummated	Chute off Mississippi	Tributary of Chesapeake Bay
8.	Effect upon maritime navigation and commerce	potential only	potential only
9.	Relationship of wrong to traditional maritime activity	Insignificant	Insignificant
10.	Holding of the Court	**Admiralty jurisdiction**	**No admiralty jurisdiction**

2. The Ninth Circuit The United States District Court for the District of Montana

Three recent district court opinions illustrate an equally confused interpretation of *Executive Jet* in the specific context of what "traditional maritime activity" means when applied to non-commercial, recreational craft. In *Adams* v. *Montana Power Company*, 354 F. Supp. 1111 (D. Mont. 1973), appeal docketed, No. 73-1371, 9th Cir., July 25, 1973, the district court refused to find admiralty jurisdiction over an action involving a deceased plaintiff whose boat was capsized in the discharge from a dam in the navigable waters of the Missouri River.[18] Relying on *Executive Jet*, the Court found that there was nothing resembling traditional maritime activity on this particular stretch of the Missouri River. It found further that the activities of swimmers, boaters, water skiers and fishermen on these waters should be regulated by local law. Unfortunately, the clear implication of the case is that if this particular section of the Missouri River had been open to commercial vessels despite the fact that a small boat was involved in a non-commercial context, the district court would have found admiralty jurisdiction.

3. The Second Circuit The United States District Court for the Western District of New York

A second District Court decision is *Rubin* v. *Power Authority of State of New York*, 356 F. Supp. 1169 (W.D. N.Y., 1973). There a diver was drawn into the water intakes of defendant's generating plant and drowned. Suit was brought in admiralty. The court refused to find admiralty jurisdiction because the complaint bore no significant relation to traditional maritime activity. Unfortunately, the Court in a footnote intimated that admiralty jurisdiction

18. Note, 44 Miss. L.J. 1013 (1973).

might have properly lain in *Davis* v. *City of Jacksonville Beach, supra,* and *King* v. *Testerman, supra,* because "they arguably arose out of the operation of vessels." These cases, however, were expressly rejected by *Executive Jet* in footnote 5.

4. The Eighth Circuit/The United States District Court for the Eastern District of Arkansas

In *St. Hilaire Moye* v. *Henderson,* 364 F. Supp. 1286 (E.D. Ark. 1973), decided more than ten months after *Executive Jet,* the District Court reached a result in direct conflict with the Fourth Circuit's *Crosson* decision. *Moye* was an action by a motorboat passenger against three defendants, the owner of the boat, the operator and a fellow passenger. Plaintiff claimed personal injuries sustained in a boating accident on the Arkansas River. The District Court held that

> the admiralty jurisdiction of the federal courts in Arkansas extends to motorboat accidents occurring on the navigable lakes and streams of this state. 364 F. Supp. at 1293.

Ignoring the test stated in *Executive Jet,* the district court, in unpublished memorandum opinion delivered June 8, 1973, holds that the "type of activity in which the boat is being operated" is irrelevant to the jurisdictional inquiry.[19] Inexplicably, the jurisdictional holding of the Court in no way is limited to cases in which the wrong bears a significant relationship with traditional maritime activity.

Moye is the most confused and erroneous of all of the post-*Executive Jet* admiralty tort jurisdiction cases.

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19. The Arkansas District Court has apparently decided to stand firm behind the 1971 decision in *Free* v. *Sample,* 324 F. Supp. 1362 (W.D. Ark. 1971), the 1972 decision of this Court in *Executive Jet* to the contrary notwithstanding. See also, *Madole* v. *Johnson,* 241 F. Supp. 379 (W.D. La. 1965), a case involving a motorboat accident occurring on Lake Hamilton in Arkansas.

5. This Court Should Decide Whether a POTENTIAL or an ACTUAL Effect on Maritime Commerce Is Necessary to Support Jurisdiction

Executive Jet, in the context of aviation, clearly answers the question of what constitutes "a significant relationship to traditional maritime activity". 409 U.S. at 268. The lower federal courts will have little, if any, difficulty applying *Executive Jet* to aviation cases.[20] Still lacking, however, is an answer to the same question in the context of recreational craft and other non-commercial vessels.

Specifically, the instant case contains facts which will enable the Court to settle once and for all (a) whether a remote or merely *potential* effect upon maritime commerce will suffice, or (b) whether an *actual* effect upon, or involvement with, maritime affairs is necessary. More generally, this case presents an excellent fact situation through which this Court may settle, permanently and concretely, the jurisdictional standard by which the activities and tortious conduct involving recreational, non-commercial vessels and their occupants shall be governed.

E. The Factual Context of Executive Jet Has Led to Uncertainty Regarding the Applicability of Pre-Executive Jet, Non-Aviation, Admiralty Tort Jurisdiction Precedents, Concerning Which the Circuits Have Been in Sharp Conflict

1. Some Courts Have Restricted Executive Jet to Aviation Cases

Some courts (erroneously, we believe) have held that *Executive Jet* has no application to non-aviation tort cases. See, e.g., *Watson* v. *D/S/A Idaho*, 359 F. Supp. 496, 499

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20. See, e.g. *Teachy* v. *United States*, 363 F. Supp. 1197 (M.D. Fla. 1973). Compare *Hark* v. *Antilles Airboats, Inc.*, 355 F. Supp. 683 (D. V.I, 1973), and *Higginbotham* v. *Mobil Oil Corp.*, 357 F. Supp. 1164 (W.D. La. 1973).

(E.D. Pa. 1973). In *Luna* v. *Star of India*, 356 F. Supp. 59 (S.D. Calif. 1973), the court discussed *Executive Jet*, but then, thinking the application of *Executive Jet* was limited to aviation cases, proceeded to resolve the jurisdictional issue according to pre-*Executive Jet* law.

2. "Strict Locality" in Non-Aviation Tort Cases Has Not Been Finally Interred

Askew v. *American Waterways Operators*, 411 U.S. 325 (1973) exacerbates the confusion regarding the proper scope and application of *Executive Jet*. In *Askew*, a post-*Executive Jet* case, the Court quotes from an 1834 opinion by Mr. Justice Story enunciating the strict locality test for admiralty tort jurisdiction as follows:

> 'In regard to torts I have always understood that the jurisdiction of the Admiralty is exclusively dependent upon the locality of the act.' 411 U.S. at .....

Askew then notes, 411 U.S. at ..... fn. 9, that the foregoing was a "statement we recently quoted with approval" in *Executive Jet*, 409 U.S. at 253, and in *Victory Carriers*, 404 U.S. at 205.

This raises the specter of the entire pre-*Executive Jet* controversy regarding the proper contours of admiralty tort jurisdiction in non-aviation cases. There we find the First,[21] Second[22] and Ninth[23] Circuits in sharp conflict with

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21. *Fireman's Fund American Ins. Co.* v. *Boston Harbor Marina, Inc.*, 406 F.2d 917 (1st Cir. 1969).

22. *Berwind-White Coal Mining Co.* v. *City of New York*, 135 F.2d 443, 446 (2d Cir. 1943); *Leather's Best, Inc.* v. *S.S. Marmaclynx*, 451 F.2d 800, 808 (2d Cir. 1971); *but see, McGuire* v. *City of New York*, 192 F.Supp. 866 (S.D. N.Y. 1961).

23. *United States* v. *Matson Nav. Co.*, 201 F.2d 610, 613 (9th Cir. 1953); *Gebhard* v. *S.S. Hawaiian Legislator*, 425 F.2d 1303, 1306 (9th Cir. 1970); *but see, Campbell* v. *Hackfield & Co.*, 125 F. 696 (9th Cir. 1903).

the Fifth[24] and Sixth[25] Circuits. This Court should grant certiorari here (1) to settle conclusively the conflict regarding the scope and application of the holding of *Executive Jet* and/or (2) to resolve the conflict among the circuits regarding the test for admiralty tort jurisdiction in a non-aviation context.

VI. CONCLUSION

On the basis of the arguments advanced herein, and the authorities cited in support thereof, Chicot Land Company, Inc., respectfully submits that the petition for writ of certiorari should be granted. Upon the issuance of the writ, the decision of the Court of Appeals should be reversed and remanded with instructions to dismiss for lack of admiralty jurisdiction.

JAMES L. ROBERTSON
LAWRENCE D. WADE
CLAUDE L. STUART, III
923 Washington Avenue
Greenville, Mississippi 38701

By .....
Attorney for Chicot Land Company, Inc., Defendant-Appellant

24. See cases cited in footnote 16, *supra*.

25. *Chapman* v. *City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967); *Gowdy* v. *United States*, 412 F.2d 525 (6th Cir. 1969).

CERTIFICATE

I, JAMES L. ROBERTSON, one of the attorneys of record for Chicot Land Company, Inc., one of the Appellants herein, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to the following persons:

(1) Philip E. Henderson, Esq.
704 Verret Street
Houma, Louisiana 70360
Attorney of Record for Plaintiffs-Respondents

(2) Walter R. Harwell, Jr., Esq.
P. O. Box 15029
Baton Rouge, Louisiana 70815
Attorney of Record for Plaintiffs-Respondents

(3) O. C. Burnside, Jr., Esq.
P. O. Box 288
Lake Village, Arkansas 71653
Attorney of Record for Defendant J. C. Smith

(4) William H. Drew, Esq.
P. O. Box 744
Lake Village, Arkansas 71653
Attorney of Record for Defendant Billie H. Bledsoe

This 15th day of January, 1974.

.....

JAMES L. ROBERTSON

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3285

GARLAND WAYNE KELLY and
ALLEN EUGENE KELLY, SR.,
Plaintiffs-Appellees,

versus

J. C. SMITH, CHICOT LAND COMPANY, INC., ET AL,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Mississippi

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(August 28, 1973)

Before TUTTLE, GODBOLD and MORGAN,
Circuit Judges.

GODBOLD, Circuit Judge: This case arises from a mini ship-to-shore gun battle in the Mississippi River. The vessel, no ship of the line, is a 15-foot outboard boat. The combatants are irregular forces, fleeing deer poachers afloat and outraged defenders of a private hunting preserve ashore. The armament, rather than coastal batteries and carronades on the gun deck, consists of hunting rifles. The forces encountered one another as the result of actual though unintended, aerial reconnaissance. The engage-

ment commenced with solid shot—from a rifle—fired from shore across the bow of the boat to signal it to stop. It continued on course. The gunners ashore lowered their elevation and fired into the water beside the boat. The boat continued in flight at full speed ahead, and the next rounds were fired into the boat, holing the boat and wounding the man at the tiller, who was the senior man on board, and another. The force afloat, having suffered these serious casualties, dispatched a few rounds shoreward, broke off the engagement and retired from the scene in disarray. The land detachment won the battle but lost the lawsuit. We affirm.

The central issue is whether the tort claims of plaintiffs, casualties aboard the boat, are within admiralty jurisdiction. In addition, defendants-appellants contend that the court erred in failing to sustain their plea of laches to this 5½ year old cause of action and in finding Chicot Land Company vicariously liable for the actions of defendants Smith and Bledsoe.

On November 27, 1965 Allen Eugene Kelly, Sr. and his three sons, all residents of Mississippi, slipped across the Mississippi River to Woodstock Island in their 15-foot boat for a day of clandestine deer hunting. The island is located on the west side of the main channel. It is covered with timber and well stocked with wild game, especially deer. It was owned by Anderson-Tully Co., which had granted to Chicot Land Company, an Arkansas land management corporation, a license for exclusive hunting rights on the island. In return for the license Chicot paid a fee, maintained roads and fire lanes on the island, employed the caretaker, and assumed general responsibility for the well being of the island. Woodstock Hunting Club, the hunting rights licensee prior to Chicot, was an association formed to enjoy hunting on the island and to communally share the expenses of the license and hunting. Chicot succeeded

to the hunting club's license because the club was unable to pay the annual rental regularly or to perform the necessary maintenance and construction on the island. After Chicot took over the license the club members continued to enjoy the hunting rights, and the club reimbursed Chicot for its expenses as the club members paid their dues. Defendant J. C. Smith, a resident of Arkansas, had been the caretaker of the island for its various owners since the 1930's. He was also the prime mover in organizing and running the hunting club.[1] At the time of the incident Smith was employed by Chicot to maintain its heavy construction equipment, and to serve as caretaker for the island.[2]

During the afternoon of November 27, 1965, Defendants Smith and Bledsoe were at the clubhouse on the island. Another club member flying a light airplane evidently sighted the Kellys' boat and dropped a note to Smith and Bledsoe informing them of the suspected poachers on the island. The Kellys, suspecting discovery, took to their boat in an attempt to flee. Simultaneously, Smith and Bledsoe rushed to where the note indicated the boat was docked. At that point the parties' stories diverge. The exchange of gunfire ensued. Smith and Bledsoe claimed that they signaled and yelled at the Kellys to return to the island in order to establish their identity and that the Kellys responded by shooting at them. The Kellys contended that Smith and Bledsoe fired first. The District Court found that Smith and Bledsoe initiated the firing,

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1. The president of Chicot was a hunting companion of J. C. Smith and an officer and director of the Woodstock Hunting Club since its formation.

2. His duties as caretaker included the regulation and supervision of all hunts, the general care and maintenance of the clubhouse, keeping up the fire lanes and roads, making sure that an adequate food supply was available for the game, and keeping off all trespassers and poachers.

first across the bow of the vessel to indicate that it should stop, then into the water next to the boat. The Kellys continued at full speed to try to get out of range, and Kelly, Sr., indicated he would not return to the bank. The two men on shore then fired into the boat, striking Kelly, Sr., and Garland Wayne Kelly. One of the Kelly sons then fired his rifle at Smith and Bledsoe.

In early 1971 Kelly, Sr., and his injured son, Garland Wayne Kelly, filed suits for their injuries in federal district court against Smith, Bledsoe, Chicot, Anderson-Tully, and the members of the Woodstock Hunting Club, alleging diversity of citizenship and admiralty jurisdiction.[3] The District Court dismissed the Club on a motion for summary judgment.[4] After a nonjury trial the court concluded that despite the Kellys' status as trespassers, Chicot, Smith, and Bledsoe were jointly and severally liable to Kelly, Sr., for $69,772.40 and to Garland Wayne Kelly for $2,593.96. It found that Chicot was vicariously liable for Smith's actions under respondeat superior and for Bledsoe's actions because Bledsoe was acting under the instructions and at the request of Smith to protect and defend Chicot's valuable hunting rights on the island. Anderson-Tully was absolved of liability because Smith and Bledsoe were not acting in its behalf. Integral to the District Court's decision were its conclusions that the cause of action was one in admiralty and that the Kellys were not barred by laches. Those are the issues on appeal, plus the issue of Chicot's vicarious liability. Defendants do not contest, under the clearly erroneous rule, the District Court's finding that Smith and Bledsoe were the aggressors, nor the conclusions that

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3. The incident spawned other litigation also. In 1968 a Mississippi state court had convicted and fined Smith and Bledsoe for criminal assault and battery. Also in 1968 the Kellys evidently brought suit against Smith and Bledsoe in an Arkansas court for damages to their boat.

4. That dismissal was not appealed.

Smith and Bledsoe committed the intentional tort of assault and battery and that the force used in protecting Chicot's exclusive hunting rights was excessive.

a. *Admiralty tort jurisdiction*

The issue of jurisdiction is crucial. If jurisdiction was sustainable only on diversity grounds the Kellys' *Erie*-bound claim was barred by the Mississippi one-year statute of limitations for assault and battery cases. Miss. Code Ann. § 732.[5]

Historically the standard for determination of maritime tort jurisdiction was viewed as a question of the locality of the tort. Maritime law governed only those actions where the "substance and the consummation of the injury" took place on navigable waters. *The Plymouth*, 70 U.S. (3 Wall.) 20, 33, 18 L.Ed. 125, 127 (1886). The strict locality standard was perfunctorily repeated with such frequency[6] that most courts seemingly lost track of the failure of the Supreme Court to explicitly decide whether maritime tort jurisdiction turned solely on maritime locality. In *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 58 L.Ed. 1208 (1914), a case involving injuries sustained by a stevedore on board a vessel while loading copper, the Court upheld federal admiralty jurisdiction but

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5. The shifting of the river channel has created extensive litigation concerning the precise location of the Arkansas-Mississippi boundary. Anderson-Tully Co. v. Walls, 266 F. Supp. 804 (N.D. Miss. 1967); Arkansas Land & Cattle Co. v. Anderson-Tully Co., 248 Ark. 500, 452 S.W. 2d 636 (1970); Mississippi v. Arkansas, 403 U.S. 951, 29 L.Ed. 2d 862 (1971), but the parties to this action agreed that the incident in this case occurred in Mississippi.

6. Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 66 L.Ed. 321 (1922); State Indust. Comm. v. Nordenholt Corp., 259 U.S. 263, 66 L.Ed. 933 (1922); Victory Carriers v. Law, 404 U.S. 202, 30 L.Ed. 2d 383 (1971) (see exhaustive list of cases in fn. 2); Penn Tanker Co. v. U.S., 409 F.2d 514 (CA5, 1969); 7A Moore, Federal Practice, Admiralty ¶ .325 [3] (2d ed. 1972).

explicitly found it unnecessary to consider whether maritime locality alone was sufficient. The Court did not address the question directly again until 1972.[7] In *Executive Jet Aviation v. Cleveland*, ... U.S. ....., 34 L.Ed.2d 454 (1972), plaintiff's plane lost power from ingesting seagulls into its engines while taking off from defendant's airport and came to rest and sank off the end of the runway in Lake Erie. Plaintiff sued in admiralty, alleging that defendant negligently failed to keep its runway free of seagulls or to warn of their presence. The Court of Appeals found that the tort occurred on land, therefore the case was not cognizable in admiralty. *Executive Jet Aviation, Inc. v. City of Cleveland*, 448 F.2d 151, 154 (CA6, 1971). But the Supreme Court faced the broader question of whether maritime locality alone is sufficient to create admiralty tort jurisdiction.

In the factual context of *Executive Jet* the Court declared:

> . . . the mere fact that the alleged wrong "occurs" or "is located" on or over navigable waters—whatever that means in an aviation context—is not of itself sufficient to turn an airplane negligence case into a "maritime tort." It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity . . . .

..... U.S. at ....., 34 L.Ed.2d at 467.

In reaching its decision about airplane negligence cases the Court pointed out that

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7. Despite the general acceptance of the strict locality standard, a small line of cases recognized that *Imbrovek* had left the question open. The Raithmoor, 241 U.S. 166, 60 L.Ed. 937 (1916); The Pozman, 276 F. 418 (S.D.N.Y. 1921); Sidney Blumenthal & Co. v. U.S., 30 F.2d 247 (CA2, 1929); Kermac v. Compagnie Generale Transatlantique, 245 F.2d 175 (CA2, 1957).

> . . . there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more consonant with the purposes of maritime law than is a purely mechanical application of the locality test.

Id. at ....., 34 L.Ed.2d at 463.

Foreshadowing the Supreme Court's analysis and conclusion in *Executive Jet*, this court recognized the inadequacies of the strict liability test in *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100, 109-111 (CA5, 1970). And in *Peytavin v. Government Employees Ins. Co.*, 453 F.2d 1121 (CA5, 1972), we concluded that the facts and circumstances of each claim must have a substantial connection with maritime activities or interests in order to invoke the admiralty jurisdiction of the federal courts.[8]

The analysis and thrust of *Executive Jet*, coupled with our decision in *Peytavin*, dictate the conclusions that maritime locality alone is no longer sufficient to sustain mari-

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8. Sporadically other cases had adopted this view. Chapman v. Grosse Pointe Farms, 385 F.2d 962 (CA6, 1967); McGuire v. New York, 192 F. Supp. 866 (S.D.N.Y. 1961); Smith v. Guerrant, 290 F. Supp. 111 (S.D. Tex., 1968); Campbell v. Hackfield & Co., 125 F. 696 (CA9, 1903). *Cf.* Gowdy v. U.S., 412 F.2d 525 CA6, 1969); Davis v. Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965); King v. Testermann, 214 F. Supp. 335 (E.D. Tenn. 1963); Peterson Coal & Oil Co. v. U.S., 323 F. Supp. 1198 (N.D. Ill. 1970); O'Connor & Co. v. Pascagoula, 304 F. Supp. 681 (S.D. Miss. 1969); Hastings v. Mann, 226 F. Supp. 962 (E.D.N.C. 1964), *aff'd* 340 F.2d 910 (CA4, 1965). The English courts adopted the same view. The Queen v. The Judge of the City of London Court, 1 QB 273 (1892). See also, 7A Moore, Federal Practice, Admiralty ¶ .325 [3] - [5] (2d ed. 1972); Black, Admiralty Jurisdiction; Critique and Suggestions, 50 Colum. L. Rev. 259 (1950); ALI, Study of the Division of Jurisdiction Between State and Federal Courts (1969).

time jurisdiction,[9] and that the wrong must bear a significant relationship to maritime activity.

In *Executive Jet, Peytavin, & Watz,* the courts presented and analyzed the rationale for adopting significant relationship to maritime activity as a requirement for admiralty jurisdiction. The strict locality test suffered from a susceptibility to mechanical application and from a tendency to create inconsistent results in cases otherwise conceptually analogous. In *Smith & Son v. Taylor,* 276 U.S. 179, 72 L.Ed. 520 (1928), a longshoreman knocked from a wharf into the water by a sling being lowered from a vessel had remedies only under state law, while in *Minnie v. Port Huron Term. Co.,* 295 U.S. 647, 79 L.Ed. 1631 (1935), the longshoreman who was standing on the vessel and knocked onto the wharf had federal law remedies. Another problem engendered by the strict locality rule was determination of where the tort occurred. See the Sixth Circuit's opinion in *Executive Jet, supra.* Indeed courts often equated injury with the broader concept of tort, which encompasses not only injury but causation and considerations of public policy. In 1948, as a result of cases which held that injury to property on land caused by vessels on navigable streams was not a maritime tort, e.g., *The Plymouth, supra,* Congress adopted the Extension of Admiralty Act, 46 U.S.C. §-740. See, Black, Admiralty Jurisdiction; Critique and Suggestions, 50 Colum. L. Rev. 259 (1950); 7A Moore, Federal Practice, Admiralty ¶ .325[4].

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9. If indeed locality alone actually ever was sufficient. As noted in Smith v. Guerrant, 290 F. Supp. 111, 112 fn. 4, (S.D. Tex. 1968), in the cases where the Supreme Court most unequivocally set out the strict locality rule the relation between the dispute and maritime commerce was manifest. State Indust. Comm. v. Nordenholt Corp., supra; Grant Smith-Porter Ship Co. v. Rohde, supra.

The District Court found that the stretch of the Mississippi River where the Kellys were injured was navigable. The evidence of navigability, including testimony by a tugboat captain who regularly traveled that stretch, is sufficient to support the court's finding, and it is not clearly erroneous. Rule 52(a), F.R. Civ. P.; *McAllister v. U.S.*, 348 U.S. 19, 99 L.Ed. 20 (1954); *Chaney v. City of Galveston*, 368 F.2d 724 (CA5, 1966).

However, in this case admiralty jurisdiction does not arise from the bare facts that the Kellys' injury was consummated on navigable waters while they were in a boat. While those facts weigh towards maritime jurisdiction, we must look to all the circumstances for a substantial maritime relationship. Both *Peytavin* and *Executive Jet* offer guidelines for the determination.

The incident in *Peytavin* was a rear-end car collision on a floating pontoon used for loading and unloading a ferry, which resulted in a whiplash neck and back injury to plaintiff. The court, admitting that both parties were using facilities which were connected to maritime commerce, focused on the relationship to maritime activities or interests of the parties, the nature and apparent cause of the accident, and the injury sustained. Finding that a rear-end collision between terrestrial vehicles, operated by landlubbers, and resulting in a typical automobile traffic accident injury lacked sufficient maritime flavor, we concluded that admiralty jurisdiction was absent. 453 F.2d at 1126.

In *Executive Jet*, the Court recognized that superficial similarities may exist between the plights of sinking ships and airplanes downed on water but pointed out that ". . . the plane's unexpected descent will almost invariably have been attributable to a cause unrelated to the sea. . . ." The Court also stressed the inherent differences between water and air transportation and said:

> [Admiralty] [r]ules and concepts . . . are wholly alien to air commerce, whose vehicles operate in a totally different element, unhindered by geographical boundaries and exempt from the navigational rules of the maritime road. The matters with which admiralty is basically concerned have no conceivable bearing on the operation of aircraft over land or water.

..... U.S. at ....., 34 L.Ed.2d at 468. The Court did not decide whether an aviation tort could ever bear a "sufficient relationship to traditional maritime activity to come within admiralty jurisdiction . . .," and indeed it suggested that an aircraft performing a function traditionally performed by waterborne vehicles might bear a sufficient relationship. ..... U.S. ....., 34 L.Ed.2d at 469. See, e.g., *Hornsby v. The Fishmeal Co.*, 431 F.2d 865 (CA5, 1970) (mid-air collision of light aircraft used in spotting schools of fish); *Hark v. Antilles Airboats, Inc.*, ... F.Supp. ..... (D. V. I., 41 USLW 2507, March 7, 1973) (seaplane crash).

From the facts and analysis of *Executive Jet* and *Peytavin* we can discern factors to be considered in the circumstances before us: the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law.

The party most seriously injured was the pilot, the person responsible for the safe navigation of the river. The vehicle involved was a boat, not an automobile or airplane, whose function was transportation across navigable waters, a traditional role of watercraft.[10]

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10. *Compare, Adams v. Montana Power Co.*, ... F. Supp. ....., (D. Mont. Civ. No. 2115, Feb. 22, 1973) (negligent operation of a recreational boat on a landlocked fishing and skiing lake); see, Stolz, Pleasure Boating and Admiralty, 51 Calif. L. Rev. 661 (1963).

The other instrumentalities involved—firearms—and the injuries they caused, are not so inherently indigenous to land as to preclude any maritime connection. Additionally, upholding admiralty jurisdiction does not stretch or distort long evolved principles of maritime law. Admiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters.

Policy militates toward admiralty jurisdiction in this case. The admiralty jurisdiction of federal courts stems from the important national interest in uniformity of law and remedies for those facing the hazards of waterborne transportation. Rifle fire directed at a vessel, albeit a small one, on a major commercial artery, and injuring the pilot, presents sufficient danger to maritime commerce for the federal courts of admiralty to assume jurisdiction and to furnish remedies to those aboard the vessel and injured by that conduct. Regardless of whether the Kellys had available remedies in state courts, the federal interest in protecting navigation on the Mississippi River overrides any considerations of federal-state comity or conflicts of interest.

b. *Laches*

In *Watz v. Zapata Off-Shore Co., supra*, and *Powell v. City of Key West*, 434 F.2d 1075 (CA5, 1970), we discussed the interrelated and often overlapping elements, excuse for delay and prejudice to the defendant, that bear on whether a long-delaying plaintiff is time-barred. *See also, McMahon v. Pan American World Airways, Inc.*, 297 F.2d 268 (CA5, 1962); *Molnar v. Gulfcoast Transit*, 371 F.2d 639 (CA5, 1967); *Akers v. State Marine Lines*, 344 F.2d 217 (CA5, 1965). The Kellys were diligent in seeking to bring this suit, but, the court found, were thwarted by the failure of reputable law firms to diligently represent them. The District Court found that the delay by

the Kellys in bringing the suit was justifiable, and that defendants suffered no prejudice, in fact were aided by the delay. An unknown witness became available to defendants after the running of the Mississippi statute of limitations. The trial judge enjoys a wide area of discretion in ruling on a claim of laches, *Powell v. City of Key West, supra,* and we cannot say that he exceeded it in this case.

c. *Chicot's vicarious liability*

Although some evidence suggests that Chicot lacked substantial control over Smith's activities on the island, there is sufficient evidence indicating that Smith was indeed acting as an agent protecting Chicot's interests on the island to warrant the finding of vicarious liability. The conclusion that Bledsoe was acting to protect Chicot's interest under the instructions of Smith also finds sanctuary in the plainly erroneous rule.

AFFIRMED.

MORGAN, Circuit Judge, dissenting:

In spite of the beacon provided by the Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland,* ..... U.S. ....., 34 L.Ed.2d 454 (1972), the majority seems to have run aground on the rocks of admiralty jurisdiction. Had I been in command, I would have charted our course differently by holding that the federal courts have no jurisdiction over this cause of action.

After years of intellectual erosion, the "pure locality" test for admiralty jurisdiction has been washed to sea. Since *Executive Jet*, a condition of admiralty tort jurisdiction is that "the wrong bear a significant relationship to traditional maritime activity." 34 L.Ed.2d at 467. Every-

one agrees that "locality plus" is the test in this case,[1] but we are still faced with the question, "locality plus what?" The majority holds that, "we must look to all the circumstances for a substantial maritime relationship." I agree with them that the important considerations are the functions and roles of the parties, the types of vehicles and instrumentalities involved, the causation and type of injury and the role of admiralty law.

But an additional consideration is present when assertion of admiralty jurisdiction involves a potential conflict with applicable state law. Such a conflict exists here, because state rules also govern these events. Even if brought in federal court on diversity grounds, the state substantive law, including its statute of limitations, would apply. *Ragan* v. *Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530 (1949). Thus, by asserting admiralty jurisdiction, we effectively deprive the state of its control over this cause of action. Such deprivation is justified in many cases, but only if the federal interest in uniformity outweighs the other interests at stake.

In this sense our analysis of the admiralty clause of the Constitution can be analogized to be now well-developed body of case law interpreting *Erie R. Co.* v. *Tompkins*. See *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958), *Hanna* v. *Plumer*, 380 U.S. 460 (1965) (Harlan, J. concurring) and *Szantay* v. *Beech Aircraft Corporation*, 349 F.2d 60 (4 Cir. 1965).

Using this type of analysis, we must examine the relevant federal and state interests in this case to see which

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1. The progeny of *Executive Jet* may abandon the requirement of a maritime locality altogether, and physical location will be only one factor in the equation. But since the district court found that this tort occurred in navigable waters, and that finding is not clearly erroneous, we are not faced with that question.

is more important. The State of Mississippi has a strong interest in the outcome. This is shown by the fact that state substantive rules would apply if the case were based on diversity jurisdiction, by the existence of a state criminal penalty for the actions of some of the parties, and the local nature of the tort of assault and battery. The local nature of the incident is further emphasized by imagining a case in which the terrestrial, as opposed to maritime, participants in this battle were injured, and sued their attackers. Essentially, that case is the same as the one we are called upon to decide, yet the assertion of admiralty jurisdiction in the hypothetical would be a gross overextension of federal power into areas of local concern.

The federal interest, on the other hand, is minimal. The majority states that rifle fire directed at a vessel presents a danger to maritime commerce which the federal courts ought to recognize. But this language obscures the facts of this case. Mr. Kelly and his cohorts used a 15-foot boat to sneak across the Mississippi River onto Woodstock Island to engage in poaching. There is simply no overriding federal interest in protecting such conduct. This is not to say that trespassers should not be protected against over-reaction by their victims. But the extent to which they should be protected is a matter of purely local concern, not of federal concern. The law of admiralty has purely commercial origins and purposes. Its usefulness is derived from the strong federal interest in controlling interstate and foreign commerce on water, and in fashioning a body of rules to govern the unique (sometimes uniquely hazardous) aspects of waterborne transportation. *Watz* v. *Zapata Off-Shore Co.*, 431 F.2d 100 (5 Cir. 1970). The complex and peculiar rules of admiralty are particularly suited for deciding suits arising out of "traditional maritime activities, involving navigation or commerce on

navigable waters." *Executive Jet Aviation* v. *Cleveland*, 34 L.Ed.2d at 460. In particular, one of the essential characteristics of admiralty jurisdiction is its uniformity, providing predictable and constant relationships between parties engaged in maritime activities. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970). But uniformity is hindered, not advanced, by the majority's decision in this case. A slight change in physical location would have produced entirely different results. The plaintiffs had no reasonable expectation as to which substantive law would be applied to their actions. No federal interest would be served by extending the admiralty rules to cover their activities, and as shown above, significant state interests would be abrogated.

For these reasons, I believe that no admiralty jurisdiction exists over this case, and I must respectfully dissent.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3285

GARLAND WAYNE KELLY and
ALLEN EUGENE KELLY, SR.,
Plaintiffs-Appellees,

versus

J. C. SMITH, CHICOT LAND COMPANY, INC., ET AL.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Mississippi

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Aug. 28, 1973, 5 Cir., 1973, ... F.2d .....).

(November 19, 1973)

Before TUTTLE, GODBOLD and MORGAN,
Circuit Judges.

PER CURIAM: The Petition for Rehearing filed on behalf of Chicot Land Company, Inc., is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX "C"

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

ALLEN EUGENE KELLY, SR.,
Plaintiff,

v.

J. C. SMITH, BILLIE H. BLEDSOE, CHICOT LAND COMPANY, INC., AND ANDERSON-TULLY COMPANY,
Defendants.

No. GC 71-5-S

GARLAND WAYNE KELLY,
Plaintiff,

v.

J. C. SMITH, BILLIE H. BLEDSOE, CHICOT LAND COMPANY, INC., ANDERSON-TULLY COMPANY AND WOODSTOCK HUNTING CLUB,
Defendants.

No. GC 71-18-S

ALLEN EUGENE KELLY, SR.,
Plaintiff,

v.

J. C. SMITH, BILLIE H. BLEDSOE, CHICOT LAND COMPANY, INC., ANDERSON-TULLY COMPANY AND WOODSTOCK HUNTING CLUB,
Defendants.

No. GC 71-19-S

(Consolidated Cases)

RULING OF THE COURT

(Filed May 11, 1972)

Ruling of the Honorable Orma R. Smith, Judge, on Thursday, April 13, 1972, in Clarksdale, Mississippi.

The Court: Gentlemen, in the beginning, let me announce that should I desire at a later date, to edit the oral opinion given by me from the bench today, I reserve the right to do so. And, in addition, I reserve the right to supplement the decision which I will render from the bench today with a written opinion or memorandum of decision if I find such to be appropriate in order to clearly state the Court's position on the several issues before the Court.

I presume the greatest difficulty which faces a trial judge when he is the finder of the facts is to determine which side is telling the true story about the matter. There are always two sides to every question, and it is unfortunate that the trial judge has to make the decision, but that seems to be a part of the duties of a trial judge when the jury is waived or when a jury is not permissible or required in an action.

To begin with I am going to act, before I proceed, upon the motion of Anderson-Tully Company for a judgment of default against Mr. Billie H. Bledsoe on its cross-claim. As I have previously indicated, I think the process in this case, that is the first case, No. GC 71-5-S, is sufficient to bring Mr. Bledsoe before court for an in personam judgment. In other words, I think he is before the Court on the cross-claim since the attorney who represents him regularly, according to his testimony, has elected to receive and has received, without any objection, all copies of the papers, notices, and documents of every nature filed in this case. I think there is a default as against Anderson-Tully, and I am going to enter a judgment of default against Mr.

Bledsoe in favor of Anderson-Tully for the amount of money, if any, which the Court feels that the plaintiff in GC 71-5-S is entitled to recover against Anderson-Tully.

The first issue which I want to discuss is the Mississippi statute of limitations. I have indicated in a previous hearing in this case that it is my opinion, should the action be tried in a State court or in a Federal court under State law without admiralty jurisdiction, the one-year statute of limitations would apply to this action.

The Mississippi statute of limitations does not give the Court the right to adopt the doctrine of laches, just the statute of limitations; if the action is barred the right of recovery is likewise barred.

Section 722 of the Mississippi Code Annotated is the statute of limitations of general application to torts in Mississippi. This has been held repeatedly by the Mississippi Supreme Court. All tort actions, except those which may be excepted or excluded by Section 732, or perhaps one or two other special statutes, which I don't recall right now, may be brought within six years after the cause of action accrues. Section 722 provides, and I quote:

> "All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of action accrued, and not after."

So that is the general statute, as I have said. However, we do have another statute, Section 732, which provides, and I quote:

> "All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, and for libels, shall be commenced within one year next after the cause of such action accrued, and not after."

Now, our Supreme Court in one of the later decisions of the court, Dennis v. Travelers Insurance Company—and when I say "our Supreme Court", I have reference to the Mississippi Supreme Court—in a 1970 case, appearing at 234 Southern 2d, 624, had this to say with reference to Section 732, and I quote:

> "It is clear that Mississippi Code 1942 Annotated Section 732 (1956), which provides an inclusive listing of the recognized intentional torts is controlling in the case at bar. There can be no escape from the bar of the statute of limitations applicable to intentional torts by the mere refusal to style the cause brought in a recognized statutory category and thereby circumvent prohibition of the statute. Furthermore, the letter, which is the basis for the action at bar, falls squarely within the purview of the statute under the category of 'menace' as set out in the statute."

I think that definition, or rather description, of the inclusive listing of the statute by the Mississippi Supreme Court is determinable of this particular question here. For that reason all claims, in all three cases, which have no standing in admiralty cannot prevail. Any relief or damages which the Court may accord in this case, if the Court awards damages, can be based only on such elements of damage as are proper under maritime law.

Now, the next question with which the Court will deal is whether the Court has admiralty jurisdiction of these actions. Of course the first and fundamental requirement is that this occurrence must have happened on a navigable waterway.

And, going back to the case of The Daniel Ball v. United States, 10 Wall. 557, 19 L.Ed. 999, an 1971 case, the court set out requirements with reference to navigable waterways. In discussing the history of the question in

England and other places, and what determined the question in those places, the court laid down this rule, I think, for the American jurisprudence, or rather the jurisprudence in this country, by saying this, and I quote:

> "A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

In this case we have proof by Captain Dill that during this period of time and for many years prior thereto he used this waterway as a regular source of travel in the operation of his tug and the barges attached thereto, on a regular basis for many, many years. I think that testimony, in the absence of any testimony to the contrary, is sufficient to meet the burden of proof in this case. There has been no testimony to the contrary produced for the Court by other people who might have knowledge of the same facts. And, I can't ignore this uncontradicted testimony or question the truthfulness of it, where there is no testimony to the contrary. To come to any other

conclusion the Court would be required to hold that the man was telling something that wasn't true. I have no reason to believe he is telling something that is not true.

So it's upon that ground and also, generally, upon the nature of the waterway, as shown in the photographs, which have been introduced, with the explanation of the changes which have been made in the waterway from the time of this incident and the time the pictures were taken. The fact that fishing boats and boats for personal transportation use this waterway, along with the other evidence, I think is sufficient to meet the burden of proof in this case.

The Court therefore holds as a matter of fact that the waterway on which the boat was traveling at the time of this incident was a navigable waterway within the meaning of the law, and, for that reason, the Court has admiralty jurisdiction over the matter, provided the accident or the incident which occurred constitutes a maritime tort.

Now, in connection with the latter point, the Court has had that matter before him, too, on briefs. I have read the cases which have been cited by counsel.

I want to hesitate here to compliment counsel on all sides for the excellent manner in which this case has been presented to the Court, both at this trial and at previous hearings. There have been excellent counsel on all sides of the case. The case has been well tried by counsel, there is no doubt on that point. Counsel know well what they are doing. It is a real pleasure to try a case of this type with counsel who are so efficient in the trial.

The Plymouth, 1866, 3 Wall. (70 U.S.) 20, 18 L.Ed. 125, held that the jurisdiction of the admiralty over maritime torts depends upon locality.

This case was cited in Watz v. Zapata Off-Shore Company, a Fifth Circuit case appearing at 431 F.2d 100, decided in 1970. The opinion goes on to quote from other cases, setting out quotations from these cases. The court then said:

> "Several courts have found the conclusion inescapable that locality is the determining factor and that it is not the place where the negligent acts occur that is all important, but rather the place where the tort occurs. A tort is deemed to occur not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action."

And of course the injuries in this incident occurred on the river, in the boat. And, having found that the boat was in navigable waters, under the holding of Plymouth, and subsequent cases, the Court finds that the tort committed was a maritime tort.

There is some discussion about whether there must be some maritime connection with the transaction to justify the holding that the tort involved is a maritime tort. Counsel have cited, and I have read several times, the recent case of John L. Peytavin v. Government Employees Insurance Company, and others, decided by the Fifth Circuit on January 7th, 1972. The opinion was written by Judge Gewin. He held in that case that the circumstances involved in the case did not warrant a holding that the tort involved was a maritime tort, giving the trial court admiralty jurisdiction.

There are a number of cases which have been decided by the Fifth Circuit, but I don't believe the Fifth Circuit has actually come to grips with the primary problem created by the Plymouth.

However, in this case I hold that there was a maritime connection with this incident; that the boat was being used for the personal transportation of these parties on a navigable stream, and for that reason the incident had a maritime connection within the rule. This holding, in my opinion, is not in conflict with the holding of Judge Gewin in the case to which I have just made reference. I, therefore, hold that the Court has admiralty jurisdiction in this matter for the reason that the tort occurred on navigable waters and because the tort was a maritime tort.

This brings us to the question of laches. That, too, is a troublesome question for the Court. The defendants urge upon the Court a holding that since the actions were not brought by plaintiffs until about five and a half years after the incident occurred they are barred under the laches doctrine because the plaintiffs delayed bringing the actions for an unreasonable period of time and the defendants have been prejudiced thereby, especially in view of the fact that if the actions had been brought in the State court or if the actions had not been within the admiralty jurisdiction of the Court the one-year statute of limitations would apply.

I think you must look at the facts in the case to solve that problem, because I believe the law is well settled that the Court is not bound by the State statute of limitations. Although the one-year statute of limitations would apply if the actions were not within the admiralty jurisdiction of the Court, the Court is of the opinion that in determining this issue, some consideration should be given to Mississippi's six-year statute on general tort actions. The question as to the applicable statute is oftentimes difficult for Mississippi lawyers to determine, and certainly it would be difficult for laymen to decide between the two statutes.

The evidence shows that these parties acted promptly in connection with this matter, insofar as lay people may be concerned. In this accident or this incident—I don't think it was an accident, I think it was a deliberate matter, so far as that is concerned, all parties were probably guilty of deliberate acts. But this incident occurred on November 27th, 1965. On December the 9th, 1965 both plaintiffs employed a law firm in Greenville, Mississippi—Robertshaw and Merideth, at the time, having contacted Mr. Merideth. They gave to him medical authorizations; they entered into a contract with him for representation in which he agreed to act diligently to represent their interests to the best of his ability at all times.

As ordinary lay persons, dealing with a law firm with the reputation which this law firms enjoys and enjoyed at that time, which was and is excellent, they acted as reasonable persons when they employed this law firm and relied upon the firm to take care of their interests in the matter. They not only contracted to give the firm contingent fees, but they also paid the firm $400 as a retainer, to cover expenses in the case.

The evidence shows that plaintiffs followed the cases diligently, and they contacted Mr. Merideth's law firm on many, many different occasions. Finally, plaintiffs demanded that the firm turn the case back to them, which the firm did in 1970. Acting very promptly, after receiving the file and getting the case back in their hands, plaintiffs went to Cleveland, Mississippi and employed the law firm of Jacobs, Griffith and Hatcher, which, again, was and is a firm of excellent reputation. The firm took the case and agreed to render prompt and efficient services in the matter. Yet, the Jacobs firm was not acting as quickly or as fast as plaintiffs wanted it to act; and, after contacting the firm several times about the case, plaintiffs demanded their file and received it after the

file was returned to the Merideth firm by the Jacobs firm. Plaintiffs then took the cases down to Baton Rouge, Louisiana where they employed Mr. Henderson and his associates. Within a month or so, or within a few days thereafter, the cases were filed.

I am going to hold that there was no unreasonable delay on the part of plaintiffs in bringing the actions. To hold otherwise, I think, would be an injustice to people who have shown themselves to be diligent in trying to get their cases before a court of justice. But that is not enough, of course, to justify the court to overrule the defense of laches in this case. Plaintiffs must not only show that there has been no unreasonable delay but also that the delay has not resulted in prejudice to defendants. In other words, it must appear that defendants have not been prejudiced by the delay in the defense of the suits. A failure to prove either of these, in my opinion, would justify the interposition of the defense of laches.

Having dealt with the first, I now deal with the second. The principals who are involved in this matter, Mr. Smith and Mr. Bledsoe, were arrested for this incident, which occurred in 1965. They were under arrest and under indictment, as is shown by the file which has been furnished the Court and which is on file in the case. The criminal action was not tried until January 23rd, 1968, over two years after the incident, two years and about two or three months later.

During this period of time, facing a felony charge, I'm sure that these defendants did not leave any stones unturned to retain their evidence and see that none of the evidence was misused or dissipated or anything like that. They needed this evidence to prove their innocence.

When the criminal case came on for trial, after the jury had been selected and the evidence had been pre-

sented for a day, the defendants, each of them, entered a plea of guilty to a lesser offense, that is, to assault without intent to kill and murder. This plea brought each of them a $250 fine. The evidence does not show, in my opinion, that either of them has been prejudiced by the delay. If the delay has prejudiced anyone it has been the plaintiffs, because they have shown to the Court that their remembrance is not as good now as it was then on some of the immaterial, irrelevant and unimportant matters. But the testimony on behalf of the defendants is positive and straight. And in addition to that, if the case had been filed and tried within a year they wouldn't have had the benefit of Mr. Morgan's testimony. They wouldn't have had the testimony of Mr. Morgan because Mr. Morgan only made it known recently. So, all in all, I am going to find that under the evidence in this case no prejudice has resulted to any of the defendants on account of the delay. For the reasons given, I am going to hold that the defense of laches is not applicable in this case.

That brings us to the main point at issue, that is, who was the aggressor in this matter. It is apparent to the Court that the Kellys went upon property where they knew they had no right to be; they knew that the property was private property and under Hunting Club supervision, and that they had no right to be on the property. They did, however, go upon the property for either one of two purposes, maybe both of them. They went on the property that afternoon, the four of them, primarily to hunt deer, and did hunt deer but did not kill any deer. I am inclined to believe, and so hold, that they had in mind also that they might locate some place where they might have a chance to hunt ducks from that island.

However, while their boat was tied up at the dead trees in the water, at this landing place, their presence

was discovered by some of the club members who were in a plane flying over the island. This fact was communicated to Mr. Smith, and at Mr. Smith's request, Mr. Bledsoe took him in his, Mr. Bledsoe's automobile, into the interior of the island. I believe the facts show that the lodge is located on the north part of the island. Anyhow, they came in contact with these people. And the Kellys, upon seeing the plane come over the island two or three times, I think comprehended that their presence had been made known to the caretaker of the island and they attempted to get in their boat and get away.

They then left the place where they were docked, got out into the river, and, as they were traveling along the river, the Court holds it to be a fact that they were fired upon by Smith and Bledsoe. I realize the testimony in this case is conflicting. The Court has to make a credibility choice of the evidence. In other words, I have to adopt the testimony which I feel to be more reasonable in the matter.

The burden of proof is upon the plaintiffs of course, in this case to show that they were unjustly attacked. I think the proof in the case shows, and I so find, that as the Kellys were moving southward in their boat Mr. Smith and Mr. Bledsoe stopped their automobile, got out of it, came to the top of the bank with guns, and Mr. Smith fired a shot toward the boat, across the bow, which of course indicated that he wanted them to stop. Then he motioned for them to come over. He might also have asked them to do this. I don't believe the Kellys could understand what he was saying, or if he was saying anything that they could hear it. When this happened, and they didn't stop, Mr. Smith fired another shot into the water next to the boat.

In the meantime Mr. Kelly, Senior, had arisen in the boat and had indicated to Mr. Smith and Mr. Bledsoe that he wasn't going to come to the bank. He proceeded to go full steam ahead and tried to get out of range, at which time Mr. Smith and Mr. Bledsoe fired again at the Kellys. One shot from one of the guns entered the boat, going into Mr. Kelly's ankle, and out of Mr. Kelly's ankle into the ankle of his son, who, of course, was in the boat.

After that occurred the youngest Kelly, being, I believe 15 or 16 years old at the time, returned the fire by several shots from the shotgun. Although the Kellys were illegally on the island—they were in fact trespassers—I don't believe Mr. Smith or Mr. Bledsoe had the right to shoot at them or to use their guns in an attempt to stop them and bring them ashore by the use of their weapons. Consequently, I hold that both of them are liable to Mr. Kelly and his son who brought these actions for whatever damages they are entitled to recover.

That brings us to the proposition of whether Mr. Smith and Mr. Bledsoe's actions on that occasion can be transmitted to two companies—Chicot Land Company and Anderson-Tully Company—the question of whether either one or both of them may be vicariously liable to the Kellys for the conduct of Smith and or Bledsoe, whether the doctrine of respondeat superior applies.

I think the evidence in this case is conclusive that Mr. Smith, through Chicot Land Company, controls the hunting rights on this island. He has controlled the hunting rights on the island for many, many years. I think he arranged with Anderson-Tully Company to place the rights in the name of Chicot Land Company so that he might have control of the rights as long as he lived and, if anything happened to him, Mr. Pine could have them.

The Court believes that they are valuable rights, and I think these rights were placed in the name of Chicot Land Company for that purpose.

These parties, Smith and Chicot Land Company permitted the hunting club to use the hunting rights under certain conditions, where the hunting club would pay the costs of the hunting rights and the charge by Anderson-Tully. In addition to that, the club paid Mr. Smith $150 a month and assumed all expenses in connection with the maintenance of roads and fire lanes on the property. Primarily, I think Mr. Smith, through the Chicot Land Company, owned and controlled these rights, and Mr. Pine holds 51 percent of the stock of that company. He is President of it and, in addition to that, a director.

The land company is authorized under its charter of incorporation to engage in this kind of activity if it desires to do so. If there is nothing to prevent it under the law, they can do it. I therefore hold that the land company, Chicot Land Company, is vicariously liable under the doctrine of respondeat superior for the acts of Mr. Smith and Mr. Bledsoe, because Mr. Bledsoe was acting under the instructions and at the request of Mr. Smith in the matter upon which they were engaged, or the matter of defending or trying to defend and protect the hunting rights on the island. I therefore find that the land company is jointly and severally liable with Mr. Smith and Mr. Bledsoe.

Now, with reference to Anderson-Tully Company, under all the facts and circumstances in this case I do not feel that there is any liability on it for the acts of these parties. I think the testimony is clear that Mr. Smith and Mr. Bledsoe were acting, not on behalf of Anderson-Tully to protect its rights, but acting so as to protect

the hunting rights that Mr. Smith himself held or at least held with Mr. Pine and his company.

My holding is reinforced in that regard because of the fact that the real difficulty occurred after the Kellys had left the island. They were then in a navigable river and, so far as any danger to the timber or things of that nature was concerned, that had been brought to an end. The Kellys were leaving the island and were in navigable water. I think the connection of Mr. Smith and Mr. Bledsoe, at the time, with the matter was to get the Kellys in to the island so they could find out who they were and either confront them with the fact that they were hunting on the island in violation of the private rights of other parties or possibly to arrange for their arrest and prosecution for hunting or for trespassing on the land.

So, Mr. Smith and Mr. Bledsoe were not acting, in my opinion, within the scope of any duty imposed on them, or either of them, under the lease with Anderson-Tully or under any appointment that might have been made to Mr. Smith by Anderson-Tully as a caretaker of the island.

Gentlemen, I think that disposes of all the justiciable issues involved in the case except possibly the matter of damages. Now, I think that under the agreement, or at least the statement that has been made by Doctor Boyd's attorney, I believe you gentlemen have agreed to take the deposition of Doctor Boyd, and possibly the other doctors at Campbell's Clinic, in order to prove the extent of the injuries received by Mr. Kelly, Senior, and in order to give the Court some foundation upon which to fix the amount of damages in the case.

After that has been concluded, and you can give the Court a copy of the deposition, I will ask counsel, if they will, to give me a short memorandum of authorities with reference to the damages which the plaintiff claims and the elements of damage which may be authorized by law under the Court's holding.

I will withhold the entry of a final order in the case, or judgment in the case, either for Mr. Kelly, Senior, or the other Mr. Kelly, the other plaintiff in the case, until that comes in. I will go ahead and enter the two judgments by default in the case that I have already indicated.

APPENDIX "D"

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

ALLEN EUGENE KELLY, SR.,
Plaintiff,
v.
J. C. SMITH, BILLIE H. BLEDSOE, CHICOT LAND COMPANY, INC., and ANDERSON-TULLY COMPANY,
Defendants.
No. GC 71-5-S

GARLAND WAYNE KELLY,
Plaintiff,
v.
J. C. SMITH, BILLIE H. BLEDSOE, CHICOT LAND COMPANY, INC., ANDERSON-TULLY COMPANY and WOODSTOCK HUNTING CLUB,
Defendants.
No. GC 71-18-S

ALLEN EUGENE KELLY, SR.,
Plaintiff,
v.
J. C. SMITH, BILLIE H. BLEDSOE, CHICOT LAND COMPANY, INC., ANDERSON-TULLY COMPANY and WOODSTOCK HUNTING CLUB,
Defendants.
No. GC-71-19-S

(Consolidated Cases)

MEMORANDUM OF DECISION

(Filed June 29, 1972)

The final question for decision by the Court relates to the quantum of damages which plaintiffs are entitled to recover.

After a careful consideration of the evidence submitted to the Court on the trial of the case, deposition of Dr. Harold B. Boyd and memorandums of the parties, the Court makes the findings of fact and conclusions of law which follow.

Plaintiff, Allen Eugene Kelly, Sr., (Mr. Kelly) suffered an injury to his right ankle as the direct and proximate result of the gunshot wound received by him on November 27, 1965. The bullet entered, passed through and destroyed the ankle. The bottom of the tibia, the bottom of the fibia and the top of the talus were torn away. Parts of the bullet exited on the side opposite the point of entrance. A large portion of the bone and tissue were destroyed and foreign matter was carried into the bones of the ankle. A large amount of blood was lost and one of the arteries supplying blood to the foot was irreparably damaged.

Mr. Kelly was carried to the hospital in Greenville, Mississippi, where he was attended by Dr. Thomas G. Barnes, a surgeon connected with Gamble Brothers and Archer Clinic. Mr. Kelly remained in the hospital for several weeks and continued to suffer from his injured ankle. On August 3, 1966 Dr. Barnes referred Mr. Kelly to Campbell's Clinic in Memphis, Tennessee, where he was attended by Dr. Harold B. Boyd, an orthopedic surgeon on the clinic's staff. Dr. Boyd performed an ankle fusion on Mr. Kelly's ankle on or about November 7, 1966. As a result of the fusion Mr. Kelly's leg is shorter than the

other one. This condition has caused Mr. Kelly to have back trouble, the nature of which is said by Dr. Boyd to be a back strain. The gunshot wound received by Mr. Kelly has resulted in a chronic infection of the ankle. Intermittently, the ankle becomes red, swollen and infected. Mr. Kelly can obtain relief only by a rupture of the swollen ankle or by an incision to drain the sinus. During these episodes Mr. Kelly runs a fever and is incapacitated.

Mr. Kelly's physicians estimate that he has suffered a fifty five percent (55%) disability of the foot and ankle, and approximately a twenty percent (20%) disability of the body as a whole. Before his injury Mr. Kelly worked for Swift and Company, at Greenville, Mississippi, as a shipper-receiver. In this work Mr. Kelly was required to walk and stand and be on his feet on damp floors for a large portion of the work day. Mr. Kelly had worked for Swift and Company in this position for twenty-six years before he received the injury. After being injured, Mr. Kelly went back to work but was unable to perform his regular duties and was assigned to a desk job. Mr. Kelly worked until March 21, 1969, but on the advice of his attending physicians he has not worked since that time.

Swift and Company paid Mr. Kelly his full salary of $437.50 per month through October 16, 1969 and then $218.75 per month from October 17, 1969 through April 23, 1970. Mr. Kelly is now on a pension with Swift and Company, the amount being $113.60 per month.

The Court finds from all of the evidence in the case that Mr. Kelly has suffered and will continue in the future to suffer extreme and excruciating physical pain and anguish as the direct and proximate result of the injury

received by him. Also as the direct result of his injuries, Mr. Kelly has suffered a loss of wages and will continue to suffer a loss of wages, as his earning capacity and ability to work has been seriously impaired.

Mr. Kelly is now fifty-eight years of age. Prior to his injury he was active in his work and engaged in other pursuits which he cannot now pursue on account of his physical condition brought on by his injuries. Mr. Kelly's earnings, at the time of his injury, was $5,252.00 per year. He claims that he has suffered a loss in wages from March 21, 1969 to the present in the sum of $11,379.00. Swift & Company gratuitously paid Mr. Kelly his full salary from March 24, 1969 to October 16, 1969 and a portion of his salary from October 17, 1969 through April 23, 1970. Mr. Kelly now draws a pension from Swift & Company in the amount above mentioned. Such payments by Swift & Company do not justify a claim on the part of defendants for an offset against the amount which they would otherwise owe him on account of his injuries.

Mr. Kelly also claims loss of future wages in the sum of $35,889.00. The amount is calculated at the rate of $5,252.00 per year for six years and ten months. Mr. Kelly will become sixty-five years of age at the end of that period.

The Court does not, however, believe that Mr. Kelly has suffered a total permanent disability. The Court finds that Mr. Kelly has suffered an impairment in his ability to work, with resulting loss to wages, to the extent of fifty to sixty percent. Mr. Kelly's work required him to stand, walk and be on his feet most of the time. He can no longer perform work which requires such activities on his part. When Mr. Kelly's ankle is draining he cannot perform work of any kind. Between draining episodes,

however, the proof shows that he can do sedentary work. Mr. Kelly's work experience and the education which he has do not qualify him to perform sedentary work which would be highly remunerative.

Considering all aspects of the case, the Court finds that Mr. Kelly has suffered a loss of past and future wages, including permanent partial disability, in the sum of $35,000.00.

The Court finds that Mr. Kelly is entitled to recover for medical expenses incurred for the treatment of his injuries in the amounts as follows:

Kings Daughters Hospital Greenville, Mississippi	$1,167.27
Drs. Gamble Brothers and Archer Clinic (Dr. Thomas G. Barnes), Greenville, Mississippi	630.00
Baptist Memorial Hospital Memphis, Tennessee	333.95
Campbell Clinic (Dr. Harold B. Boyd and others), Memphis, Tennessee	2,584.92
Anesthesiologist	45.00
Drug Bills	11.26
Total	$4,772.40

For the physical pain and suffering Mr. Kelly has endured and will continue to endure in the future as result of his injuries, the Court finds, after considering all of the evidence in the case, that Mr. Kelly is entitled to receive compensation in the sum of $30,000.00.

In summary, the Court fixes the damages to which Mr. Kelly is entitled as follows:

1)	Loss of past and future wages, including permanent partial disability, the sum of	$35,000.00
2)	Pain and suffering, past and future, the sum of	30,000.00
3)	Medical and hospital expenses, the sum of	4,772.40
	Total recovery	$69,772.40

Garland Wayne Kelly was injured by the bullet, but his injury was not serious and was temporary in nature. The Court finds that Garland Wayne Kelly is entitled to recover damages, as follows:

1)	Loss of wages	$ 312.48
2)	Medical expense, King Daughters Hospital and Gamble Brothers Clinic (Dr. Barnes)	281.48
3)	Pain and suffering	2,000.00
	Total recovery	$2,593.96

On the issue of interest, the Court does not feel when all things are considered, that plaintiffs are entitled to pre-judgment interest.

The evidence in the case shows that Mr. Kelly was knocked down in the Kroger store in Greenville, Mississippi on an occasion after he received his injury. The Court has considered this incident and does not find that contributed to his disability.

Appropriate judgments will be entered by the Court. Mr. Kelly received an injury on this occasion which has

This, the 27th day of June, 1972.

JUDGMENT (GC 71-5-S and GC 71-19-S)

(Filed June 29, 1972)

The above numbered and captioned actions, consolidated by the Court for trial, came on for hearing before the Court, Honorable Orma R. Smith, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered, it is

ORDERED AND ADJUDGED:

1) That the plaintiff, Allen Eugene Kelly, Sr., recover of defendants, J. C. Smith, Billie H. Bledsoe and Chicot Land Company, Inc., jointly and severally, the sum of SIXTY NINE THOUSAND, SEVEN HUNDRED SEVENTY TWO DOLLARS AND FORTY CENTS ($69,772.40), with interest thereon at the rate of 6% per annum from this date until paid, and costs of his action;

2) That plaintiff, Allen Eugene Kelly, Sr., take nothing from the defendant, Anderson-Tully Company, and the said actions shall be, and they hereby are, dismissed on the merits in respect to defendant, Anderson-Tully Company, and the defendant, Anderson-Tully Company, recover of the plaintiff, Allen Eugene Kelly, Sr., its cost incurred herein.

This, the 27th day of June, 1972.

JUDGMENT (GC 71-18-S)

(Filed June 29, 1972)

This action came on for trial before the Court, Honorable Orma R. Smith, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, it is

ORDERED AND ADJUDGED:

1) That the plaintiff, Garland Wayne Kelly, recover of defendants, J. C. Smith and Chicot Land Company, Inc. jointly and severally, the sum of TWO THOUSAND, FIVE HUNDRED NINETY THREE DOLLARS AND NINETY SIX CENTS ($2,593.96), with interest thereon at the rate of 6% per annum from this date until paid, and his cost of action; and

2) That plaintiff, Garland Wayne Kelly, take nothing from the defendant, Anderson-Tully Company, and the action be, and hereby is, dismissed on the merits in respect to the defendant, Anderson-Tully Company, and that the defendant, Anderson-Tully Company, recover of plaintiff, Garland Wayne Kelly, its cost incurred herein.

This, the 27th day of June, 1972.